

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: October 22, 1996

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Epilepsy Foundation of Northeast Ohio 506-4033-3000
Cases 8-CA-28169 and 8-CA-28264 512-5072-2400
787-6075-0100
787-6075-6700

These cases were submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by refusing to allow an unrepresented employee to have another employee present at an investigatory interview held by the Employer.

FACTS

Arnis Borgs is an unrepresented employee of the Epilepsy Foundation of Northeast Ohio (the Employer). Along with other employees, Borgs has set up several employee committees, including: (1) a "Retreat Committee," intended to improve employees' morale and conditions; a "brown-bag lunch" program, intended to get all employees and managers together to improve communications in the workplace; and (3) an employee "Ethics Committee." Borgs has also complained to management about the mileage reimbursement rates being paid to all of the Employer's employees and, with fellow employee Ashraf Hasan, complained about their direct supervisor, Rick Berger.

On December 28, 1995, Borgs was called to a meeting with Berger and Christine Loehrke, the Employer's Executive Director. During this meeting, Loehrke questioned Borgs about his having discussed salary information with other employees and told Borgs that he was not allowed to do so. After this meeting, Borgs was given a written reprimand for his having discussed salary information with other employees. Borgs refused to sign the reprimand without consulting an attorney and, before he did so, Borgs was given a second written reprimand for having refused to sign the first.

On February 1, 1996, after Borgs and Hasan sent memoranda to Loehrke raising concerns about Berger's supervision, Loehrke and Berger called Borgs to another meeting with both of them.¹ Borgs refused to attend such a meeting with both Loehrke and Berger without Hasan present, although he offered to meet alone with Loehrke. Loehrke refused to allow Hasan to be present or to meet alone with Borgs, and she sent Borgs home for the day for refusing to attend the meeting alone with Loehrke and Berger. The next day, Borgs was terminated. The Employer claims that Borgs was terminated for "gross insubordination" in refusing to attend the meeting with Loehrke and Berger. Later, Hasan was discharged, ostensibly for refusing to sign a list of "performance objective" goals he considered to be unattainable.²

The Region has decided to issue complaint alleging that the Employer violated Section 8(a)(1) of the Act by: (1) its December 28, 1995, interrogation of Borgs regarding his discussion of salary information with other employees; (2) its written reprimands to Borgs, regarding his discussion of salary information and his failure to sign the first reprimand; and (3) Hasan's termination in retaliation for his protected concerted activities.³ These

¹ The Region has concluded, given the preceding events, that this meeting constituted an investigatory interview which Borgs reasonably believed could result in disciplinary action, a prerequisite for any finding that Borgs had a right to have Hasan present under the rule upheld by the Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975). This conclusion has not been submitted to the Division of Advice.

² The Region has determined that this reason was pretextual and that Hasan was actually terminated in retaliation for his protected concerted activity with Borgs. This determination has not been submitted to the Division of Advice.

³ The Region has also determined to issue complaint alleging that Borgs' termination violated Section 8(a)(1) of the Act regardless of whether the Employer was required to honor his request to have Hasan present under Weingarten, supra, on the rationale that the Employer was required to honor

allegations have not been submitted to the Division of Advice.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by refusing Borgs' request to have Hasan present at the proposed meeting with Loehrke and Berger, and thereafter by discharging him for his insistence on Hasan's presence.

1. Weingarten

In NLRB v. Weingarten, Inc., supra, the Supreme Court upheld the Board's rule that an employer violates Section 8(a)(1) by insisting that an employee attend an interview that the employee reasonably believes could result in disciplinary action without the presence of a union representative requested by the employee. Significantly, the Court found that this right "inheres in Section 7's guarantee of the right of employees to act in concert for mutual aid and protection."⁴ Moreover, the Court stated that the Board's rule was appropriate because it furthers the Act's designed purpose of eliminating the inequality of bargaining power between employees and employers.⁵ To underscore the applicability of the Court's reasoning in a non-union setting, we note that dissenting Justices Powell and Stewart stated that, "it must be assumed that the Section 7 right today recognized . . . also exists in the absence of a recognized union,"⁶ without drawing any rebuttal from the Court's majority decision.

Borgs request for Hasan to be present at the meeting since the meeting involved their collective complaints, citing Vic Tanny International, Inc., 232 NLRB 353, 354 fn. 5 (1977), enfd. 622 F.2d 237 (6th Cir. 1980). This determination has not been submitted to the Division of Advice.

⁴ 420 U.S. at 256-257.

⁵ Id. at 262.

⁶ Id. at 270 fn. 1.

2. Materials Research Corp.

The Board first directly addressed the applicability of the right upheld in Weingarten to a non-union setting in Materials Research Corp.,⁷ finding that unrepresented employees enjoyed a similar right to have a fellow employee present at an investigatory interview. The Board explained that while the Supreme Court in Weingarten had termed the right discussed in that case as the right to the assistance of a "union representative," this terminology was utilized because it accurately described the fact pattern presented to the Court and not because it was intended to limit employees' rights solely to such a setting. Indeed, the Board noted that the Court in Weingarten:

emphasized that the right to representation is derived from the Section 7 protection afforded to concerted activity for mutual aid or protection, not from a union's right pursuant to Section 9 to act as an employee's exclusive representative for the purpose of collective bargaining.⁸

In this regard, the Board explained that the protections of Section 7 do not vary based on whether employees are represented by a union or not, with only very limited exceptions.⁹

Moreover, the Board discussed how the Supreme Court had carefully differentiated the limited role of a Weingarten representative, in which capacity the employer is not obligated to bargain with the union, from the union's general representative role in collective

⁷ 262 NLRB 1010 (1982). We note that the Board, while not directly relying upon the issue, had previously stated with regard to the Weingarten right that, "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." Glomac Plastics, Inc., 234 NLRB 1309, 1311 (1978).

⁸ 262 NLRB at 1012.

⁹ Ibid, citing Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1974).

bargaining. In the limited situation of a Weingarten representative, the Board reasoned, an attending coworker can likewise assist the interviewed employee by eliciting favorable facts or helping to get to the bottom of the problem. This is so because, as in the unionized workplace discussed in Weingarten, the single employee "may be too fearful or inarticulate to describe accurately the incident being investigated, or too ignorant to raise extenuating factors."¹⁰ Similarly, even in a nonunion setting, "a coworker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily."¹¹ Significantly, regardless of the efficacy of such a representative, the Board expressed its unwillingness to substitute its judgment for that of those employees facing discipline who believe that the presence of a coworker lends a measure of meaningful protection.¹²

Finally, the Board in Materials Research Corp. noted that the application of Weingarten rights is not likely to interfere any more with an nonunion employer's operations than with a unionized employer. In this regard, the Board emphasized that the Weingarten right is triggered only by investigatory interviews, that the employer need not undertake the interview if it so chooses, or may schedule the interview so as not to disrupt production, and that production may actually benefit by having an individual present who may be able to assist in expeditiously resolving the problem.¹³ All of these considerations apply in both union and nonunion situations. Therefore, for all these reasons, the Board concluded that the language and purposes of the Act, as well as the Supreme Court's decision in Weingarten, support finding the right upheld in Weingarten applicable in nonunion settings.

3. Sears/DuPont IV

¹⁰ Id. at 1015. See also Weingarten, 420 U.S. at 262-263.

¹¹ 262 NLRB at 1015.

¹² Ibid.

¹³ Id. at 1015-1016.

After following Materials Research Corp. in several subsequent cases,¹⁴ the Board changed direction in Sears, Roebuck and Co.,¹⁵ finding the Weingarten right to be dependent on its union setting. Despite the clear statement of the Weingarten Supreme Court that the basis for its decision could be found in employees' Section 7 rights, the Sears decision interprets that case as though it were primarily animated by the principles underlying a union's Section 9 authority as the exclusive representative of bargaining unit employees, and an employer's "right" to deal with unrepresented employees individually. Thus, the Board in Sears found application of the Weingarten right in a nonunion setting would "require the employer to recognize and deal with the equivalent of a union representative, contrary to the Act's exclusivity principle."¹⁶

The Board in Sears also concluded that Section 7 rights may vary based on whether employees are represented by a union or not.¹⁷ The only case support offered for the proposition, however, was Emporium Capwell Co. v. Western Addition Community Organization, supra, the same case offered in Materials Research Corp. to exemplify the "very limited exceptions" to the general rule that the protections of Section 7 do not vary based on whether employees are represented by a union or not.

The Board in Sears found that its conclusion was compelled by the Act.¹⁸ Thereafter, the Board followed this new rule and dismissed a complaint in a case that it had previously found a violation and had its order enforced by

¹⁴ See, e.g., E.I. DuPont de Nemours & Co. (DuPont I), 262 NLRB 1028 (1982); E.I. DuPont de Nemours & Co. (DuPont II), 262 NLRB 1040 (1982); Valley West Welding Co., 265 NLRB 1597, 1599 (1982).

¹⁵ 274 NLRB 230 (1985).

¹⁶ Sears, 274 NLRB at 232.

¹⁷ Id. at 231.

¹⁸ Id. at 230 fn. 5.

the United States Court of Appeals for the Third Circuit.¹⁹ After the Third Circuit again remanded the case, this time on a petition for review, the Board modified its position that its Sears conclusion was compelled by the Act.²⁰ In DuPont IV, the Board acknowledged that its earlier determination in Materials Research Corp. was "a permissible construction of the Act, but not the only permissible construction."²¹ Indeed, the Board noted that:

A literal reading of Section 7 might indeed suggest that it bestows on nonunion employees the right in question here, because an employee who insists on the presence of another employee when facing the employer in a matter that may lead to discipline thereby attempts to engage in concerted activities for "mutual aid and protection," insofar as there is an implicit promise that the employee enlisting support would offer his own support were the other facing such an interview.²²

Nonetheless, the Board in DuPont IV again denied the Weingarten right to nonunion employees, albeit recasting its position as one resulting from balancing "the conflicting interests of labor and management."²³ The DuPont IV Board stated that, in considering Weingarten in a nonunion setting, "many of the useful objectives listed by the Court either are much less likely to be achieved or are irrelevant."²⁴ In particular, it found that: (1) there is

¹⁹ E.I. DuPont de Nemours & Co. (DuPont III), 274 NLRB 1104 (1985). The Third Circuit's enforcement decision had previously been vacated and remanded at the Board's request. E.I. DuPont de Nemours & Co. v. NLRB, 733 F.2d 296 (3d Cir. 1984).

²⁰ E.I. DuPont de Nemours & Co. (DuPont IV), 289 NLRB 627 (1988)

²¹ *Id.* at 628.

²² *Ibid.*

²³ *Id.* at 628, 631.

²⁴ *Id.* at 629.

no guarantee that the presence of a fellow employee will safeguard the interests of the employees as a group; (2) the fellow employee would be much less able than a union steward to determine whether the employer is acting justly, because there is no collective-bargaining agreement defining misconduct and discipline, as well as no entitlement to information from the employer; (3) the fellow employee would likely be much less skilled at "assisting employees at an investigatory interview and in helping to diffuse potentially disruptive encounters" than a union steward; and (4) the nonunion employee will not usually be able to avert formal grievances because there will not usually be an enforceable grievance procedure. Finally, the DuPont IV Board opined that denying this right to unrepresented employees might actually benefit them, stating that:

To the extent that recognition of a nonunion Weingarten right induces employees to insist on a condition that may in turn induce employers simply to cancel investigatory interviews (unless the employee waives his Weingarten right), there is a serious question whether extending the right to nonunion employees may not work as much to their disadvantage as to their advantage.²⁵

The DuPont IV Board then concluded that "the interests in assuring such representation under Section 7 are less numerous and less weighty than the interests apparent in the union setting," and compared them to "nonunion employers' interests in conducting investigations in accordance with their own established practices and procedures and maintaining efficiency of operation."²⁶ Based on this balancing, the DuPont IV Board posited that they would "best effectuate the purposes of the Act by limiting the right of representation in investigatory interviews to employees in unionized workplaces who request the presence of a union representative."²⁷

²⁵ Id. at 630.

²⁶ Ibid.

²⁷ Id. at 631.

4. Analysis

We conclude that the Board's decision in Materials Research Corp. was more consistent with the Act, as well as the Supreme Court's decision in Weingarten, than the Board's later reinterpretation of this issue in Sears and the DuPont cases, and that the Board should be given an opportunity to revisit the issue.²⁸ Materials Research Corp., like Weingarten, properly looks to the language of Section 7 to determine the rights of unrepresented employees, rather than misplacing its focus on exclusive representation policies set forth in Section 9. While there is nothing in Materials Research Corp. that is inconsistent with Section 9 of the Act or the principles of exclusive representation, offering a Weingarten right to unrepresented employees is consistent with the long-recognized protections afforded by Section 7 to other types of concerted action by unrepresented employees.²⁹

As summed up by the Board in Materials Research Corp., the request for a fellow employee, like the comparable request in Weingarten for a union steward, is "concerted activity -- in its most basic and obvious form -- since employees are seeking to act together . . . for mutual aid

²⁸ We note the strong support for this position expressed by the scholars who have examined the issue. See, e.g., Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1730-1750 (1989); Finken, *Labor Law by Boz -- A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 177-188 (1985); Note, *The Weingarten Right in a Nonunion Setting: A Permissible and Desirable Construction of the National Labor Relations Act*, 19 MEM. ST. U. L. REV. 207 (1989); Note, *Extending Weingarten Rights to Nonunion Employees*, 86 COLUM. L. REV. 618 (1986); Note, *Limiting the Weingarten Right in the Nonunion Setting: The Implications of Sears, Roebuck and Co.*, 35 CATH. U. L. REV. 1033 (1986).

²⁹ See, e.g., NLRB v. Washington Aluminum Co., 370 U.S. 9, 12-13 (1962).

and protection."³⁰ In the instant cases, of course, there can be no argument that Borgs was acting in concert with Hasan when he demanded his presence at the proposed meeting with Loehrke and Berger, given Borgs and Hasan's clear course of concerted conduct, including their joint complaints regarding Berger and their prior employee committee activities. Indeed, the Region has already decided to issue complaint over the Employer's termination of Hasan in retaliation for his protected concerted activities.³¹ Even in the absence of such prior concert, however, we conclude that an employee's insistence on the presence of a fellow employee at an investigatory interview that the employee reasonably believes could result in disciplinary action meets the concert requirement for Section 7 protection, as long as the employee reasonably believes that there is a fellow employee who would agree to attend.

First, as noted above, the Board's current position is that applying the Weingarten right in a nonunion setting is a permissible construction of Section 7.³² This declaration necessarily acknowledges that such a rule meets all the requirements of Section 7, including the presence of concert. Indeed, the DuPont IV Board explicitly acknowledged that:

A literal reading of Section 7 might indeed suggest that it bestows on nonunion employees the right in question here, because an employee who insists on the presence of another employee when facing the employer in a matter that may lead to discipline thereby attempts to engage in concerted activities for "mutual

³⁰ 262 NLRB at 1015.

³¹ In this regard, we note that even under the strictest analysis of the concert requirement offered in any extant Weingarten-type case, that offered by the United States Court of Appeals for the Ninth Circuit in E.I. DuPont de Nemours & Co. v. NLRB, 707 F.2d 1076, 1079 (9th Cir. 1983), the facts of the instant cases would support a finding of concerted action.

³² DuPont IV, 289 NLRB at 628.

aid and protection," insofar as there is an implicit promise that the employee enlisting support would offer his own support were the other facing such an interview.³³

Second, in the Supreme Court's Weingarten decision itself, dissenting Justices Powell and Stewart noted that, "it must be assumed that the Section 7 right today recognized . . . also exists in the absence of a recognized union,"³⁴ without drawing any rebuttal from the Court's majority decision. This similarly requires a recognition of concert. Lastly, a finding of concert is consistent with the long-standing rule that protects employee efforts "engaged in with the object of initiating or inducing or preparing for group action."³⁵

5. Retroactivity

Finally, we conclude that, if the Board concludes that there is a Weingarten violation here, there would be no bar to applying the above change in Board law to the instant cases and requiring the Employer to reinstate and make whole Borgs for his unlawful dismissal. The Board has summarized its standard in this regard as follows:

Under settled retroactivity doctrine, a new rule developed in an adjudication is generally applied to the parties in the case in which it is announced; an exception to retroactive application is made for cases in which it would work a "manifest injustice." In determining whether retroactive application will produce manifest injustice, we consider the following factors: the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing

³³ Ibid.

³⁴ Id. at 420 U.S. 270 fn. 1.

³⁵ Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).

party under retroactive application of the change of law.³⁶

Applying this standard to the instant cases makes it clear that retroactive application of a return to the rule of Materials Research Corp. would be appropriate. First, there is no indication that the Employer was "carefully tailoring all of its actions to existing Board law"³⁷ or relied upon the Board's decisions in any way. Indeed, even if it had, there is a strong argument that the Board's shifting positions and internal disagreement, as well as the volume of academic criticism of the Board's more recent positions, sufficed to put the Employer on notice that its position was "not wholly secure" and lessened the weight of any reliance interest the Employer might otherwise demonstrate.³⁸

³⁶ Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993) (citations omitted). The Board's analysis of this issue follows the Supreme Court's decision in Security and Exchange Commission v. Chenery Corp., 322 U.S. 194 (1947). See, e.g., Certain-Teed Corp., 271 NLRB 76, 77 (1984). Under this rubric, where an agency acting as an adjudicatory body announces a new rule in an order issued in a specific case:

retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Chenery, 322 U.S. at 203.

³⁷ Pattern Makers (Michigan Model Mfrs.), 310 NLRB at 931 fn. 14.

³⁸ NLRB v. Ensign Electric Division of Harvey Hubble, Inc., 767 F.2d 1100, 1102-1103 (4th Cir. 1985) (law not settled and change in Board law not "great surprise" due to cases decided over vocal dissents), quoting Local 900, International Union of Electrical Workers v. NLRB, 727 F.2d 1184, 1194-1195 (D.C. Cir. 1984).

Second, as noted above, the purpose of Section 8(a)(1) of the Act and the recognition of Weingarten rights in a nonunion setting is to safeguard employees' rights to concerted activity for mutual aid and protection. The reinstatement of Borgs certainly furthers this end, particularly given the additional complaint allegation challenging Hasan's discharge. For both Borgs and Hasan, leaving Borgs subject to "the industrial equivalent of capital punishment" would run contrary to the Act's policies.

Finally, it would not work a "manifest injustice" to require the Employer to reinstate Borgs, especially in light of the other complaint allegations demonstrating a course of conduct hostile to Borgs and Hasan's right to act concertedly. It would at least seem a greater hardship to saddle Borgs with the loss of his employment for conduct that would itself be explicitly recognized as protected, albeit belatedly. In sum, we conclude that it would be appropriate to retroactively apply a return to the rule of Materials Research Corp. in the instant cases.

We recognize that, while some Circuit Courts of Appeal have applied this standard to enforce orders involving retroactive application of changed Board policy,³⁹ other courts have been less willing to permit retroactive application based upon their interpretation of Chevron v. Huson, 404 U.S. 97, 106-107 (1971).⁴⁰ In Chevron v. Huson,

³⁹ See, e.g., Adair Standish Corp. v. NLRB, 912 F.2d 53, 56 (6th Cir. 1990); Iron Workers Local 3 v. NLRB, 843 F.2d 770, 780-781 (3d Cir. 1988); NLRB v. Semco Printing Center, Inc., 721 F.2d 886, 889 (2d Cir. 1983); NLRB v. Bufco Corp., 899 F.2d 608, 609 (7th Cir. 1990); NLRB v. Monark Boat Co., 713 F.2d 355, 361 (8th Cir. 1983).

⁴⁰ See, e.g., Mesa Verde Construction Co. v. Northern California District Council of Laborers, 885 F.2d 594 (9th Cir. 1989); Machinists District Lodge 64 v. NLRB, 949 F.2d 441, 447 (D.C. Cir. 1991); Carpenters Local Union 953 v. Mar-Len of Louisiana, Inc., 906 F.2d 200, 203-204 (5th Cir. 1990).

the Supreme Court described three general factors that a court must consider in determining whether to apply a new principle of law retroactively: (1) whether the decision to be applied retroactively has established a new principle of law either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether the application of the decision would further the operation of the new principle of law and its goals; and (3) the balance of the inequities imposed by the retroactive application.⁴¹

In Harper v. Virginia Department of Taxation,⁴² however, the Supreme Court rejected the three-factor test of Chevron v. Huson, and established a stronger presumption of retroactive application. In particular, the Court in Harper ended the practice of determining the propriety of retroactive application of new judicial rules by case-by-case equity balancing, requiring instead that any new rule be applied retroactively to all pending cases, or to none.⁴³ Any question as to the effect of this case was put to rest by the Court when it later described the evolution of this area of law, citing Harper:

While it was accurate in 1974 to say that a new rule announced in a judicial decision was only presumptively applicable to pending cases, we have since established a firm rule of retroactivity.⁴⁴

These Supreme Court cases themselves refer exclusively to judicial decisions. However some courts have applied Chevron v. Huson in the review of administrative agency decisions. Thus, the import of Harper is applicable to Chevron v. Huson when used in reviewing administrative

⁴¹ 404 U.S. at 106-107.

⁴² 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

⁴³ 113 S.Ct. at 2517, 125 L.Ed.2d at 86.

⁴⁴ Landgraf v. USI Film Products, 511 U.S. 244, ___, 114 S.Ct. 1483, 1504 fn. 32, 128 L.Ed.2d 229, 261 fn. 32 (1994).

decisions. Indeed, the D.C. Circuit has specifically noted the applicability of Harper, noting in a case involving a Board decision that, "we recognize the possibility that our precedents regarding the retroactive application of agency adjudications may require revision in light of [Harper]." ⁴⁵ In that case, the D.C. Circuit did not have to fully address the question as it found retroactive application to be appropriate even under its interpretation of Chevron v. Huson. ⁴⁶

Thus, we need not analyze the instant cases under the standards of Chevron v. Huson, as that inquiry has been abandoned by the Supreme Court, and may rely on the Board's test embodying the principles of Chenery for determining the propriety of retroactive application of new legal rulings. As discussed above, we conclude that retroactive application of a return to the rule of Materials Research Corp. in the instant cases would be appropriate as it would further the purpose of Section 8(a)(1) of the Act and the recognition of Weingarten rights in a nonunion setting without working any manifest injustice upon the Employer.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by refusing Borgs' request to have Hasan present at the proposed meeting with Loehrke and Berger, and thereafter by discharging him for his insistence on Hasan's presence. ⁴⁷

B.J.K.

⁴⁵ U.F.C.W. International Union, Local 150-A v. NLRB, 1 F.3d 24, 35 (D.C. Cir. 1993).

⁴⁶ Ibid.

⁴⁷ [*FOIA Exemptions 2 and 5*